Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States
OCTOBER 2001 TERM

ABGN SALES, INC.,

Petitioner

v.

NORMA J. HURT,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: December 3, 2001

88 pp

QUESTIONS PRESENTED

1. Does a statement by counsel at oral argument on appeal that there are no triable issues of fact which prevent entry of an order granting a cross-motion for summary judgment in favor of that attorney's client relieve the appellate court from its obligation to make an independent review of the record to determine if there is in fact a genuine issue of material fact as to the opponent's competing motion for summary judgment requiring a trial?

2. Can a statement by counsel at oral argument on appeal that there are no triable issues of fact precluding entry of an order granting a cross-motion for summary judgment in favor of that attorney's client constitute summary judgment evidence that may be considered by the court?

3. Is a party required as a fall-back position to advance the argument that there are triable issues of fact precluding the opposition party from prevailing on its motion for summary judgment when it makes a cross-motion for summary judgment and argues in support of its own summary judgment motion that there are no triable issues of fact?

4. Does granting summary judgment against a party despite the existence of genuine issues of material fact deprive that party of due process of law?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner ABGN Sales, Inc. ("ABGN") appeared by counsel as the objectant in connection with the adversary proceeding brought by the debtor, Norma J. Hurt ("Hurt"), in the United States Bankruptcy Court for the District of Arizona to determine the owner of a fund created by the election of Kachina Plywood Co. to have its shares in American Savings Life Ins. Co. rescinded. Kachina Plywood Co. did not appear and is no longer a party to this proceeding. ABGN and Hurt appeared by counsel before the Bankruptcy Appellate Panel for the Ninth Circuit and the United States Court of Appeals for the Ninth Circuit. American Savings Life Insurance Co. is no longer a party to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Neither party is a publicly traded corporation.

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OPINIONS BELOW

The opinion of the United States Bankruptcy Court of the District of Arizona (A. 1-20) is not reported. The opinion of the Bankruptcy Appellate Panel for the Ninth Circuit (A. 25-49) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (A. 50-51) is not reported. The text of all three opinions are contained in the appendix, as is the order denying the petition for rehearing with suggestion for rehearing en banc. (A. 52-53).

JURISDICTION

The Bankruptcy Court had jurisdiction over the proceeding pursuant to 28 U.S.C. § 157(b)(2)(O). The Bankruptcy Appellate Panel for the Ninth Circuit had jurisdiction over the appeal from the final order of the Bankruptcy Court pursuant to 28 U.S.C. § 158(b) and 28 U.S.C. § 1334. ABGN's Motion for Reconsideration was denied on July 7, 1999, and ABGN timely appealed that judgment to the United States District Court for the District of Arizona under 28 U.S.C. § 158 (a) on July 13, 1999. The appeal was referred to the United States Bankruptcy Appellate panel for the Ninth Circuit ("the BAP") under 28 U.S.C. § 158 (b)(1). The BAP order was filed on May 15, 2000 (A. 25), and ABGN filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit on June 12, 2000, within thirty days of the entry of the BAP order. The United States Court of Appeals for the Ninth Circuit had jurisdiction to hear the timely appeal from the

order of the Bankruptcy Appellate Panel pursuant to 28 U.S.C. § 158(d) and 28 U.S.C. § 1291. The order of the Ninth Circuit was entered on June 4, 2001. (A. 50). ABGN filed a timely petition for rehearing with suggestion for rehearing en banc (after receiving an extension from the Ninth Circuit of the 14 day time limit). The petition for rehearing was denied on September 4, 2001. (A. 52). This petition is timely as it is being filed on or before December 3, 2001, within ninety days of the order denying the petition for rehearing. Supreme Court Rules 13.1 and 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 56 reads in relevant part:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages . . .

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or

certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just . . .

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Summary judgment motions are an essential part of civil litigation in the Federal Courts. It is for this reason that this Court has in the past granted certiorari to clarify the standards to be applied by the Federal Courts in ruling on such motions. One issue left unresolved in this Court's prior precedent is the question of whether or not the Court's duty of de novo review is modified when, as is commonly the case, both sides move for summary judgment arguing that on their view of the record they are entitled to summary judgment. The Ninth Circuit's opinion in this case holds that a triable issue of fact precluding summary judgment to the opposing party which appears in the record may be ignored by the Court when counsel for both parties argue that in their view the record entitles their client to summary judgment.

A. Milton G. Pace and Norma Hurt are divorced and the shares of Kachina Plywood, Inc. stock are awarded to Hurt in the divorce action.

In 1975, Milton Pace II purchased $10,000 of stock in a company called Kachina Plywood, Inc. ("Kachina"). In 1977, Hurt filed a dissolution of marriage petition against her then husband, Milton G. Pace. The Order and Judgment entered in the divorce proceeding in May 1978 awarded Hurt stock owned in several corporations, including Kachina Plywood, Inc., which in turn owned shares of American Savings Life Insurance. In August 1978, Milton Pace Senior transferred

all of his Kachina stock to Hurt and certified that no other shares were outstanding in either his name or that of his wife. Their son, Milton Pace II was not a party to the divorce proceeding and did not receive notice of the judgment despite his purchase of Kachina stock in 1975.

B. Hurt commences an action in state court to determine the ownership of the Kachina Stock.

Seeking to claim sole ownership of the stock in Kachina, as well as other corporations, Hurt brought a complaint in Arizona state court in cause number C-372142, seeking a determination that any shares other than those she owned were invalid. The State court granted Milton Pace II's motion for summary judgment. Hurt stipulated to dismissal of the matter with prejudice. (A. 28).

C. American Savings is placed in receivership and a fund of nearly $28,000 is created after the rescission of Kachina's shares in American Savings.

Kachina owned 20,000 shares of American Savings which was placed in receivership in 1977 for fraudulent investment practices by American Savings. On November 14, 1981, Kachina transferred its interest in American Savings shares to L & L Sales Corporation. Kachina elected to exercise the reorganization option and have the shares rescinded for payment of $27,962.48. American Savings canceled the stock and placed the funds into a trust account.

D. Through a chain of assignments, ABGN obtains Kachina's interest in American Savings.

After Kachina's assignment of the beneficial interest in American Savings to L & L in 1981, L & L then assigned its interest to CTA Corp. on February 8, 1990. On January 10, 1992, CTA then assigned its beneficial interest to ABGN. (A. 29-30).

E. Hurt is placed in involuntary bankruptcy, which is converted to a voluntary Chapter 11 proceeding.

Hurt was placed into involuntary bankruptcy in December 1985, which she voluntarily converted into a Chapter 11 proceeding. She entered into a settlement with her creditors, including Kachina, providing that the proceeds from the American Savings stock were Hurt's property. Hurt also agreed to release her claims in the American Savings stock if Kachina and other creditors met certain conditions, including payment of Hurt's $50,000 in attorney's fees. ABGN was not a party to that proceeding nor a signatory to the agreement.

F. ABGN commences a state court action to determine its rights in the American Savings' fund and obtains a judgment in its favor.

In 1993, ABGN commenced an action against American Savings in Arizona state court in cause number C-346842, for judicial recognition of its interest in the American Savings proceeds pursuant to the 1992 transfer from CTA. After hearing evidence that Hurt had not asserted any claim to the American Savings proceeds, an arbitrator awarded the proceeds to ABGN. American Savings appealed the award in the Arizona Superior Court and lost. Hurt did not respond to notice from the court and judgment was thereafter entered by the state court declaring that ABGN was entitled to the proceeds from the American Savings' stock. Prior to entry of judgment, the

Arizona Superior Court required that Hurt and Kachina receive notice of the final order.

G. Hurt and ABGN file competing motions for summary judgment in the adversary proceeding commenced to determine the rights in the proceeds from the American Savings liquidation.

After receiving notice of the arbitration award, Hurt filed the proceeding below, a turnover action pursuant to chapter 11, in the Bankruptcy Court for the District of Arizona. (A. 32).

ABGN filed a motion for abstention, arguing that abstention was proper under both 28 U.S.C. § 1334(c)(2) and Ninth Circuit case law. The motion was converted to an adversary proceeding. The bankruptcy court initially granted ABGN's motion to abstain, but later reversed itself on Hurt's motion for reconsideration on September 16, 1996, stating that vacatur of the abstention order was necessary because Hurt's claim arose under a 1990 judgment entered in the bankruptcy court. (A. 33).

Hurt filed a motion for summary judgment and ABGN filed a response and cross-motion. Both parties filed lengthy statements of fact containing two different factual scenarios justifying each parties claim to the American Savings proceeds. Hurt claimed that she received all of Kachina's stock and assets through the 1978 divorce decree and 1990 judgment in adversary 87-199. ABGN claimed that it was a holder in due course of a beneficial interest in American Savings that could be traced back to its original owner, Kachina.

H. The bankruptcy court enters judgment in favor of Hurt.

The bankruptcy court concluded that Hurt owned all of the Kachina stock and was therefore entitled to all its assets, including the American Savings proceeds. The court based this conclusion on the fact that Kachina was a defunct corporation, even though no evidence was submitted that Kachina was in fact defunct. Further, without conducting an evidentiary hearing, the bankruptcy court concluded that Milton Pace II, the president of ABGN, had knowledge of the contents of the 1978 and 1990 judgments and that ABGN, therefore, had imputed knowledge and was bound by the judgment despite the fact that it was not a party to that proceeding. Thus, according to the bankruptcy court, ABGN did not obtain the beneficial interest in good faith. (A. 15-18).

After the judgment had been entered, Milton Pace II filed a motion for joinder and for reconsideration. The bankruptcy court construed the document as a motion to intervene and reconsider, which it subsequently denied.

Both Milton Pace II and ABGN filed appeals to the Bankruptcy Appellate Panel for the Ninth Circuit. In docket number AZ-99-1392, Milton Pace II challenges the denial of his motion for joinder and reconsideration. In docket number AZ-99-1450, ABGN challenged the granting of summary judgment in Hurt's favor, the vacatur of the order of abstention, and the denial of its motion for reconsideration.

I. The BAP affirms the bankruptcy court.

The BAP affirmed the bankruptcy court's orders. Upon review of the order granting summary judgment in Hurt's favor,

the court concluded that while the case was not appropriate for summary judgment, ABGN waived the existence of issues of material fact by filing a motion for summary judgment and by arguing its merits on appeal:

> While the question of the validity of the 1981 assignment from Kachina to L & L Sales is inherently a disputable factual matter that strikes us as a poor candidate for summary judgment, neither of the appellants contend in this appeal that the bankruptcy court granted summary judgment in the teeth of a genuine issue of material fact. We articulated the potential issue during oral argument of this appeal and offered the parties the opportunity to assert that there was a genuine issue of material fact. They did not avail themselves of the opportunity. Hence, the issue is waived.

(A. 36)

On the issue of abstention, the BAP concluded that ABGN failed to sustain its burden of proof on the issue and that any state law claims are now stale. The BAP concluded:

> The bankruptcy court did not err in granting summary judgment regarding the Proceeds [sic] in favor of Hurt. The only arguable basis for finding error – the existence of a genuine issue of material fact – has been waived by appellants. . . . Finally, the bankruptcy court had the authority to change its mind about abstention and vacate the order dismissing the adversary proceeding."

(A. 47).

J. The Ninth Circuit affirms the BAP

The Ninth Circuit affirmed the BAP for the reasons stated in the BAP opinion. (A. 50-51).

REASONS FOR GRANTING THE PETITION

The writ should be granted because the Ninth Circuit abdicated its responsibility to independently review the summary judgment record to determine if the record contained triable issues of fact. The issue goes directly to the proper role of the courts in the federal judicial system and the appropriate burdens placed upon parties by Rule 56 of the Federal Rules of Civil Procedure. The issue is of nationwide importance and has potential application to the vast majority of civil cases litigated in the Federal Courts. The holdings of the courts below was contrary to Supreme Court precedent regarding the appropriate standard of review on a motion for summary judgment.

The petition should also be granted because the Ninth's Circuit's holding in this case that a party who cross-moves for summary judgment must specifically advance the fall-back argument, in opposition to the adversary's motion for summary judgment, that there are triable issues of fact conflicts with the holding of every Circuit Court of Appeals which has addressed the issue, and also created an internal conflict within the Ninth Circuit. In addition, the panel's holding that an attorney's comment at oral argument constituted evidence which could be considered when reviewing a motion for summary judgment conflicts with the holdings of this Court and the other Courts of Appeals. Finally, denying a litigant a trial despite the existence

of triable issues of fact deprives the litigant of due process of law.

POINT I **The Petition Should be Granted Because the Ninth Circuit Abdicated its Responsibility to Review the Summary Judgment Motions De Novo, in Accordance with Supreme Court Precedent and Federal Rule of Civil Procedure 56, to Determine if there were Triable Issues of Fact.**

When reviewing orders deciding motions for summary judgment, an appellate court has the duty to review the record independently to determine if there are triable issues of fact. This Court has held that it should examine the record de novo on a motion for summary judgment without relying on the lower court's understanding of the record. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466 (1992). The duty of the court reviewing a motion for summary judgment is to review the record "taken as a whole". *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). The Court granted certiorari in *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.2d 574, 576 (1986) for the express purpose of determining the proper standards to apply on motions for summary judgment, and held the record must be reviewed as a whole. *Id.*, 475 U.S. at 587. The duty of independent review is important because under the summary judgment standards enunciated by this court, the moving party is not required to negate the elements of the non-moving party's case. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1990), *citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Ninth Circuit abdicated this responsibility by deciding that there were no triable issues of fact merely because ABGN's counsel, in oral argument before the BAP, claimed that there were no triable issues of fact which prevented his client from winning on appeal. The Ninth Circuit failed to heed Justice Stevens' admonishment, in dissent in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) that "it is an odd form of independent review that consists of deferring entirely to whatever a litigant claims." *Id.* at 686 (Stevens, J. dissenting).

The BAP, and the Ninth Circuit, did not engage in the proper independent review that is required on an appeal from an order granting a motion for summary judgment, and effectively granted summary judgment - a trial on papers - for no reason other than the representation of ABGN's counsel during oral argument. By affirming the granting of summary judgment to Hurt, the Ninth Circuit ignored this Court's holding that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In the case at bar, the BAP, and by inference the Ninth Circuit, conceded that triable issues of fact existed, but nonetheless affirmed the granting of summary judgment to Hurt. Litigants should not have their cases disposed of without a trial when genuine issues of fact exist. This is supported both by the language of Federal Rule of Civil Procedure 56(c), which permits the entry of judgment on a motion for summary judgment only if, "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," and this Court's precedent. *Anderson, supra* at 248. A motion for summary judgment deprives a litigant of his day in court, and therefore

the inferences are drawn in the light most favorable to the party opposing the motion. Where the record, in light of those inferences, raises triable issues of fact, the motion must be denied. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

As this Court has declared, even if the evidence, viewed as a whole, tends to support the position of one party, summary judgment in favor of that party is still inappropriate if the record taken as a whole demonstrates genuine issues of material fact. *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999). The opinion of the Court of Appeals in this matter, which held summary judgment to be proper based upon nothing more than the statement of counsel that there were no triable issues of fact, precluding summary judgment in favor of that attorney's client violated this principle and has the potential to greatly impact summary judgment procedure throughout the nation. *Hunt*, for example, concerned the constitutionality of a voting district in North Carolina. It was challenged as the product of racial gerrymandering, and defended as the product of political gerrymandering, which does not violate the Constitution. The parties filed cross-motions for summary judgment. The District Court granted summary judgment to the plaintiff, holding that the uncontroverted evidence supported the claim that the district was drawn to gather as many precincts as possible with large African-American populations. *Id.* at 545. This Court reversed. The Court held that, although the dramatically irregular shape of the district and expert affidavit declaring that the North Carolina legislature had ignored traditional districting criteria and political subdivisions supported the inference that the district was drawn with race as the impermissible primary factor, there was evidence submitted which tended to show that the district was drawn to maintain a strong party (Democratic) affiliation. *Id.* at 549. Among this evidence was an expert's

affidavit which analyzed each boundary segment in the district and concluded that the legislature included more heavily Democratic precincts more often than more heavily African-American precincts. *Id.* at 550. This was sufficient, despite the fact that the evidence may have "predominated" in favor of the plaintiff, to require denial of the plaintiff's motion for summary judgment.[1]

Here, the BAP, in an opinion adopted by the Ninth Circuit, conceded that there were genuine issues of material fact. (A. 36). Nevertheless, the Court granted summary judgment in favor of Hurt. This is not in accord with the summary judgment standards developed by this Court.

The Ninth Circuit's ruling is also contrary to the standards established by the other Circuit Courts of Appeals. By upholding the BAP ruling that the statement of counsel at oral argument that there were no triable issues of fact preventing entry of summary judgment in favor of his client eliminated the Court's duty to conduct its own independent review of the record to determine whether there were triable issues of fact, the Ninth Circuit panel which decided this case placed itself directly in conflict with other decisions from the Ninth Circuit, as well as the rule prevailing in every other Circuit Court of Appeals. Every other Circuit has held that orders deciding motions for summary judgment are reviewed de novo. This Court should grant certiorari to resolve this conflict.

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[1] *Hunt* returned to this Court last term, but the Court reviewed a judgment rendered after a trial, not a motion for summary judgment. *Hunt v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452, 1457 (2001).

The other Circuit Courts of appeal have all held that motions for summary judgment are reviewed de novo on appeal, and beyond that, the Court may affirm for any reason reasonably stated on the record. *See, O'Neill v. Baker*, 210 F.3d 41, 46 (1st Cir. 2000); *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 91 (2d Cir.), *cert den.*, __ U.S. _, 122 S.Ct. 348 (2001); *Okoye v. University of Texas Houston Health Science Ctr.*, 245 F.3d 507, 511 (5th Cir. 2001); *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 655 (6th Cir. 2000); *Diersen v. Chicago Car Exchange*, 110 F.3d 481, 487 (7th Cir. 1997), *cert den.*, 522 U.S. 868 (1997); *Grantham v. Ohio Casualty Co.*, 97 F.3d 434, 435 (10th Cir. 1996); *Burton v. Tampa Housing Authority*, __ F.3d __, 2001 WL 1379724 *2 No. 00-13607 (11th Cir. November 7, 2001). In fact, other panel opinions of the Ninth Circuit have also held that orders deciding motions for summary judgment are reviewed de novo. *Pritikin v. Dep't of Energy*, 254 F.3d 791, 796 (9th Cir. 2001).

The lower courts acted contrary to this Court's precedent and in conflict with the rule of the other Courts of Appeals when they abdicated their responsibility to review the summary judgment record de novo.

POINT II **The Petition Should be Granted to Resolve a Conflict as to Whether Statements by Counsel Can Either Be Considered as Summary Judgment Evidence, or is Sufficient to Constitute a Waiver of the Argument that the Record Contains Triable Issues of Fact.**

The only "evidence" relied upon by the BAP, and thus the Ninth Circuit panel, in concluding that ABGN had waived its contention that there were triable issues of fact is a statement

by counsel during oral argument which was in the limited context of arguing for his own client's cross-motion for summary judgment. (A. 36). The holding that a statement of counsel may constitute either waiver or evidence which may be considered when determining a motion for summary judgment conflicts with the holdings of this Court and of the other Circuit Courts of Appeals.

A. A statement of counsel is not evidence, a fact, or a binding judicial admission.

The District Courts have an independent duty to review the evidence in connection with a motion for summary judgment. This applies regardless of whether or not each party takes the position that there are no triable issues of fact. Courts review the record, not each attorney's view of the record.

In *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 230 (7th Cir. 1996), the Seventh Circuit held that the fact that counsel for both parties informed the District Court that they believed the matter could be decided on the papers in connection with the cross-motions for summary judgment did not constitute a waiver by either party of its right to a trial.

Here, after finding that its independent review of the record demonstrated that the matter was not properly suited for summary judgment, the BAP held that counsel's statement, made at oral argument in the course of supporting his own client's motion for summary judgment, somehow justified ignoring the triable issues of fact noted by the court in its review of the record. (A. 36). In the context of cross-motions for summary judgment, counsel should not be placed in the position of fearing that arguing that there are no triable issues

of fact in support of a motion for summary judgment will automatically preclude a trial on the merits.

B. A statement by counsel is not evidence to be considered in connection with a motion for summary judgment.

It is well-settled that statements made by counsel during oral argument are not considered evidence. In *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488 fn.3 (1986), this Court held that it is improper to consider as evidence statements of counsel made at oral argument of an appeal when there was no evidence in the record to support the statements. *See also, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n. 16 (1970) (unsworn statement in supplemental brief does not constitute evidence); *Hendricks v. Kansas*, 521 U.S. 346, 392 (1997) (Breyer, J. dissenting).

In conflict with this well-settled law, the Ninth Circuit in this case approved the grant of summary judgment in favor of one party based upon nothing more than the statement of counsel at oral argument that there were no triable issues of fact precluding summary judgment to that attorney's client on his competing motion for summary judgment. Counsel's statement, however, did not constitute summary judgment evidence.

The Ninth Circuit's ruling in this case has wide policy implications. The courts must not determine cases based upon "evidence" that is inherently unreliable. The statement of an attorney, who most likely lacks any personal knowledge of the underlying facts of the case, should not be the basis upon which cases are won or lost at summary judgment.

POINT III The Petition Should be Granted to Resolve a Conflict Among the Courts of Appeals as to Whether a Party Must Specifically Advance the "Fall-back" Position that There are Triable Issues of Fact when making a Cross-Motion for Summary Judgment.

The Ninth Circuit affirmed for the reasons set forth in the BAP's opinion. The BAP affirmed the judgment of the Bankruptcy Court in part because of its belief that, by cross-moving for summary judgment and arguing in support of its own summary judgment motion, ABGN had waived its right to argue, in opposition to Hurt's summary judgment motion, that there were triable issues of fact. (A. 36). This holding conflicts with the holding of every other Circuit Court of Appeals that has addressed the issue, and even conflicts with the holding of a different panel of the Ninth Circuit. This Court should grant certiorari to resolve this conflict. A party should be able to make a cross-motion for summary judgment without fearing that by doing so it has waived the Court's responsibility to review the record de novo and to deny summary judgment to both parties when triable issues of fact exist.

This Court has never explicitly adopted the concept that the making of cross-motions for summary judgment eliminates the duty of the court to analyze the record de novo and in fact there is nothing in Fed R Civ P. 56 or this Court's prior summary judgment jurisprudence which would suggest such a result, When New Jersey invoked this Court's original jurisdiction to determine the boundaries of Ellis Island, the Special Master appointed by the Court denied *both* cross-motions for summary judgment and held a trial. *New Jersey v. New York*, 523 U.S. 767, 771 (1998). This Court has therefore implicitly approved the notion that the fact that the parties make

cross-motions for summary judgment does not eliminate the court's duty to deny the motions if its de novo review reveals triable issues of fact.

A. Making a cross-motion for summary judgment does not waive any argument as to the existence of triable issues of fact.

Every Circuit Court of Appeals that has addressed the issue has held that cross-motions for summary judgment do not preclude a finding that there is a triable issue of fact. The litigants are not required to explicitly raise the existence of triable issues of fact as a fall-back position. The Ninth Circuit's opinion in the present case conflicts with its decision in *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). There, the Court held that a District Court, when reviewing cross-motions for summary judgment, must review each motion independently:

> It is well-settled in this circuit and others that the filing of cross-motions for summary judgment, both parties asserting that there are no uncontested issues of material fact, does not vitiate the court's responsibility to determine whether disputed issues of material fact are present. A summary judgment [sic] cannot be granted if a genuine issue as to any material fact exists.

Fair Housing Council at 1136. The Ninth Circuit had previously held to the same rule in *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978).

Every other Circuit Court of Appeals that has addressed the issue has concurred that a party does not waive its right to argue that there are triable issues of fact by making a cross-motion for summary judgment. In *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224 (7th Cir. 1996), the plaintiff commenced an action to enforce a right of first refusal to buy a television station. The District Court entered judgment for the plaintiff after cross-motions for summary judgment. *Id.* at 225. The Seventh Circuit reversed, holding that the filing of cross-motions for summary judgment does not constitute a waiver of that party's right to a trial. The Second Circuit has explicitly held, "The fact that both sides have moved for summary judgment does not necessarily mean that summary judgment may properly be granted for either side." *Ass'n of Int'l Automobile Mfcs., Inc. v. Abrams*, 84 F.3d 602, 611 (2d Cir. 1996). The District of Columbia Circuit has expressed the rule in even more pointed language:

> Furthermore, contrary to what appellee asserts, it does not matter that the District Court was faced with *cross*-motions for summary judgment. 'The rule governing cross-motions for summary judgment . . . is that neither party waives the right to a full trial on the merits by filing its own motion; each side concedes that no material facts are at issue only for the purposes of its own motion.'"

Sherwood v. The Washington Post, 871 F.2d 1144, 1148 (D.C. Cir. 1989) (internal citation omitted) (emphasis in original).

The Third, Fifth, Sixth and Tenth Circuits have also held that a party does not waive a trial or the existence of triable issues of fact by making a cross-motion for summary judgment. *Coolspring Stone Supply, Inc. v. American States Life Ins., Co.*, 10 F.3d 144, 150 (3d Cir. 1993) ("Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute . . . that the losing party waives judicial . . . determination whether genuine issues of material fact exist."); *John v. State of Louisiana*, 757 F.2d 698, 705 (5th Cir. 1985); *B.F. Goodrich Co. v. Untied States Filter Corp.*, 245 F.3d 587, 592 (6th Cir. 2001) ("We have held that '[t]he fact that both parties make motions for summary judgment . . . does not require the Court to rule that no fact issue exists.'") (internal citation omitted); *Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112, 114 (10th Cir. 1983).

In direct conflict with the cases cited above, the BAP panel in the case at bar, as affirmed by the Ninth Circuit in its unpublished memorandum opinion, held that ABGN waived the existence of triable issues of fact merely by making a cross-motion for summary judgment and arguing in support of its cross-motion that there were no triable issues of fact. It did so notwithstanding the fact that, as the BAP stated in its own opinion, "[T]he question of the validity of the 1981 assignment from Kachina to L & L Sales is inherently a disputable factual matter that strikes us as a poor candidate for summary judgment." (A. 36).

The issue involved is of interest to litigants throughout the nation, not just the litigants at bar. A Westlaw search in the Court of Appeals database indicates that, as of December 3, 2001, there were 2887 cases in the Courts of Appeals since

1995 involving cross-motions for summary judgment. This, of course, does not even include the numerous cross-motions for summary judgment that were not the subject of appellate review in the Courts of Appeals. The issue of whether the movants in connection with cross-motions for summary judgment waive their right to a trial where de novo review reveals triable issues of fact is of nation-wide importance. It should be resolved by the Nation's highest court.

B. If the holding of the Ninth Circuit in this case prevails, litigants will be discouraged from moving for summary judgment.

Motions for summary judgment further the goal of expeditiously resolving litigation and reserving judicial resources for those cases in which there are actually issues of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses...."); *Matsushita Electric Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(citing Advisory Committee Note that the purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Summary judgment motions should therefore be encouraged where appropriate. The holding of the Ninth Circuit in this case, however, discourages a party who has been served with a motion for summary judgment from making a cross-motion for summary judgment, lest that party be deemed to have waived the existence of triable issues of fact.[2] The policy concerns for the

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[2] ABGN is aware that a court may grant summary judgment to a non-moving party. *Celotex Corp. v. Catrett*, 477 U.S.

federal courts are significant. The holding of the Ninth Circuit will have two detrimental effects. It will discourage the making of a cross-motion for summary judgment where there truly are no genuine issues of fact, thereby adding expense and delay to the litigation process. On the other hand, a litigant may be denied a trial where the record truly does demonstrate the existence of triable issues of fact because the court abandoned its duty to review the record de novo. Neither of these two situations is desirable.

POINT IV The Petition Should Be Granted Because the Lower Courts Ignored this Court's Precedent That a Party May Not Be Deprived of its Day in Court Absent Proper Notice.

When an appellate court abdicates its responsibility to independently review the record, a party may be deprived of its day in court even though the record demonstrated that there were triable issues of fact.

The lower courts thus deprived ABGN of due process by dismissing its cause of action despite the existence of triable issues of fact. It is well-settled that a cause of action is a property right within the meaning of the due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 311 (1950). Because it is a species of property right, a party

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317, 326 (1986). However, it is still the better practice to have the parties, not the court, chart the course of litigation. A party served with a motion for summary judgment should not be discouraged from also seeking summary judgment, should it feel that summary judgment in its favor is warranted.

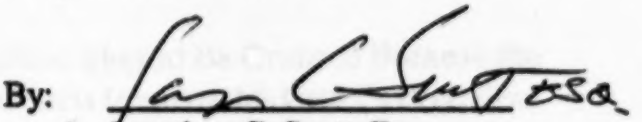
may not be deprived of a cause of action absent proper notice. *Logan* at 433; *Mullane* at 313. The core of this Court's holding in *Logan* was that arbitrary procedures may not be used to preclude a determination on the merits of a person's cause of action. *Logan* at 433. The bankruptcy court in this case violated that principle by granting summary judgment to Hurt even though triable issues of fact precluded entry of judgment in favor of Hurt as a matter of law.

CONCLUSION

For the foregoing reasons, ABGN Sales, Inc. requests that this Court grant the Petition for Writ of Certiorari and grant it such other and further relief to which it may be entitled.

Dated: December 3, 2001

Respectfully Submitted,

By: 

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:	)	Chapter 11
	)	
	)	No. 85-3802 PHX JMM
	)	
NORMA J. HURT, fka	)	
NORMA J. PACE	)	
Debtor.)		
NORMA J. HURT,	)	
Plaintiff/Petitioner,	)	ADV. 96-485
	)	
vs.	)	
	)	
AMERICAN SAVINGS LIFE	)	
INSURANCE CO., KACHINA	)	MEMORANDUM DECISION
PLYWOOD, INC., and ABGN	)	
SALES, INC.,	)	
Defendants/Respondents)		

Cross-motions for summary judgment were argued on March 24, 1999. Appearances were noted of record: Lester C. Penterman for the debtor; Ronald J. Ellett for ABGN Sales, Inc.; Gove L. Allen filed pleadings for American Savings Life Insurance Co. The court has considered the entire record in this case and, consistent with counsels' representations, agrees that there are no questions of material fact which need to be resolved by trial. All of the material

facts are agreed upon, and the only remaining item needing resolution is the legal effect to be given to those facts. The court will do so in this opinion.

BACKGROUND

The primary issue in this case is: Who is the owner of a fund of money of $28,756.87, plus accrued interest thereon? There are two claimants to the fund - ABGN and the debtor. American Savings has claimed no interest in the fund itself, but asks for its fees and the accrued interest for its interpleader role in this proceeding. Kachina Plywood, Inc., named as a defendant has defaulted, and therefore that entity has no further claim.

I. The Claims

The various claims to the fund arise out of legal rulings made in separate cases. Those cases are:

Case No.	Court	Type of Case
DR 66280	Superior, Maricopa County	Divorce proceeding between the debtor and Milton G. Pace.
C 346842	Superior Maricopa County	Receivership action concerning American Savings Life Insurance.
Unknown	Bankruptcy (Dist. of Oregon)	Bankruptcy of Kachina Plywood, Inc.
CV 93-21909	Superior, Maricopa County	Suit by ABGN against American Savings.
85-03802 PHX JMM	Bankruptcy (Dist. of AZ)	This bankruptcy proceeding, commenced December 9, 1985.
Adv. 87-199	Bankruptcy (Dist. of AZ)	An adversary Proceeding commenced in this case.

A timeline of these events will assist the parties, and any reviewing court in understanding the odyssey of this controversy.

	Pace/ Hurt Divorce Proceeding	American Savings Receivership Action	Kachina Plywood	ABGN/ American Savings Civil Action	Bankruptcy of Norma (Pace) Hurt	Adversary 87-199
Sept. 26, 1977		Receivership commenced				
May 15, 1978	Divorce Decree entered					
Aug. 2, 1978	Milton assigns Kachina Plywood stock to Norma	—				
Nov. 14, 1981			Assigns American Sav. Stock to L&L sales			
Dec. 2, 1982			Chapter 11 commenced			
December 1985					Involuntary Ch. 11 commenced	
Nov. 23, 1987		Reorganization Plan approved				
1987						Lawsuit commenced

	Pace/ Hurt Divorce Procceed ing	Amer- ican Savings Receiver ship Action	Kachina Plywood	ABGN/ Amer- ican Savings Civil Action	Bank- ruptcy of Norma (Pace) Hurt	Adver- sary 87- 199
Dec. 16, 1987		Kachina elects $28,756. 87	Kachina elects to receive $28,756. 87			
July 7, 1988		Court authoriz es payment upon resolu- tion of owner- ship				
June 30, 1988		$28,756. 87 placed in an account				
Jan.. 22, 1990					Trial Commen ces	
Jan. 23, 1990					Parties an- nounce settle- ment	
Feb. 8, 1990			L&L assign- ment to CTA Corp.			

	Pace/ Hurt Divorce Proceeding	American Savings Receivership Action	Kachina Plywood	ABGN/ American Savings Civil Action	Bankrup-cy of Norma (Pace) Hurt	Adversary 87-199
April 3, 1990						Court approves settlement and enters judgment Appeals begin.
Jan. 10, 1992			CTA assignment to ABGN			
Sept. 16, 1993				Suit commenced		
Jan. 13, 1995				ABGN receives judgment against American Savings.		
Sept. 13, 1995				ABGN gives notice to Norma of the pendency of the case.		

	Pace/ Hurt Divorce Proceeding	American Savings Receivership Action	Kachina Plywood	ABGN/ American Savings Civil Action	Bankruptcy of Norma (Pace) Hurt	Adversary 87-199
Oct. 12, 1995				Hurt advises that it was not named as a party, and is protected by automatic stay.		
1995						Supreme Court denies Certiorari. Judgment affirmed.
1996				Case transferred to bankruptcy court.		
Oct. 11, 1996				Merrill Lynch interest bearing account opened.		

A. THE PARTIES' POSITIONS

1. American Savings' Position

American Savings claims no legal interest in, nor entitlement to the fund itself. It redeemed Kachina's stock in return for its payment of $28,756.87 on December 16, 1987. That a dispute may have existed, or currently exists, between Kachina, Hurt, Pace and ABGN is irrelevant to American Savings. It simply had to hold the $28,756.87 fund until it received an order from a "court of competent jurisdiction" directing it to pay these monies over to the appropriate party. Moreover, American Savings was authorized to hold the fund in a non-interest bearing account, which it did until this court required the fund to become interest-bearing.

This court now has control over the fund. The fund is in *custodia legis*. The fund is claimed to be an asset of this estate, pursuant to the "property" provisions of 11 U.S.C. § 541(a). The instant complaint for declaratory relief as to ownership is a "core" proceeding. 28 U.S.C. § 157(b)(2)(B), (C), (E), (K), and (O).

American Savings' claim to the accrued interest is baffling, since American Savings has consistently stressed it has been under no obligation to pay interest on the fund which it held for almost 10

years before this court ordered the creation of an interest-bearing account.

Neither is American Savings entitled to attorneys' fees. It is only a stakeholder, yet it has injected itself into a fray over a fund to which it has no claim. Instead of simply filing a one-line interpleader pleading to that effect, it has multiplied its role needlessly, causing others to incur expense in order to sort out American Savings' position – or a lack thereof – a position which is and always has been merely that of a stakeholder. Its "defense costs" were needlessly incurred, and it should not be rewarded for compounding and complicating this litigation.

Therefore, as a matter of equity and discretion, the court finds and concludes that American Savings is not entitled to attorneys' fees or interest. To the extent that it paid a court appearance fee, however, it is entitled to be reimbursed for that expense.

All interest accrued on the $28,756.87, currently in the Merrill Lynch fund account no. 3235198 (Hurt Ex. 7), shall be paid

over to the rightful owner, less any appearance or filing fee, which shall be reimbursed to American Savings.

2. Kachina Plywood's Position

Kachina Plywood did not appear in this action. When its bankruptcy concluded, any interest which it had in this $28,756.87 asset, the proceeds from the American General stock, was abandoned back to it. 11 U.S.C. § 554(c). Since Kachina was defunct, and its creditors were paid or their debts discharged in its own bankruptcy case, its assets would then devolve to its shareholders. Pursuant to the divorce decree, Norma (Pace) Hurt was awarded all of the stock in Kachina Plywood, Inc. (Hurt Ex. 2). Therefore, by operation of law, Norma owned all of Kachina's unadministered assets, including the right to redeem the American Savings' stock.

In any event, Kachina's interest in the disputed fund, by virtue of its non-appearance and its defunct status, is hereby declared extinguished.

3. Norma Hurt's Position

Norma Hurt ("Norma") is the debtor. She was married to Milton G. Pace ("Milton"). Their divorce was final on May 15, 1978, over two decades ago. At the time that their divorce was final, the court awarded Norma "all shares of stock in Kachina Plywood, Inc . . . as her sole and separate property." (Hurt Ex. 2, at 7-8). She also received all shares of stock in American Savings Life Insurance Company (Hurt Ex. 2, at 8).

On August 2, 1978, in carrying out the terms of the decree, Milton assigned to Norma all of his interest in "all shares of stock in Kachina Plywood, Inc. . . .[and] American Savings Life Insurance Company. . ." (Hurt Ex. 3).

Ten years later, on or about December 16, 1987, Kachina Plywood, Inc., through its president Carlton Hull, elected to redeem the American Savings stock from the American Savings receivership, (Hurt Ex. 5). This is a clear indication that Kachina had never really assigned its interest to L & L Sales six (6) years earlier, as ABGN now contends. On July 7, 1988, the Maricopa County Superior Court, in the American Savings receivership action, authorized the distribution of Kachina Plywood's share upon issuance of a

judgment as to proper ownership "by a court of competent jurisdiction." (Hurt Ex. 6, at 2). Norma's attorney was given notice of this disposition (Hurt Ex. 8), as was Kachina Plywood (Ex. 9). At that time, Norma was debtor in this bankruptcy case.

On April 3, 1990, in the course of Norma's bankruptcy case, a settlement of an adversary proceeding was approved, by a formal judgment. (ABGN Ex. 5). The settlement, however, required parties, other than Norma, to pay certain sums, release liens and claims on real properties (See ABGN Ex. 5, para. 4). Kachina Plywood, Inc. was one of those parties. ABGN did not receive its "assignment" until January 10, 1992, two years after this settlement.

In that settlement, the proceeds of the American Savings Life Insurance stock was "found to be the property of Norma J. Hurt [Norma] and the funds are to be paid forthwith to her estate. . ." (ABGN Ex. 5, at 4, para. 2). That is what paragraph 2 provided. The judgment also provided that "Norma Hurt shall release any claims she has to American Savings Life Insurance Stock claimed by Kachina, this stock being <u>different</u> from the stock <u>proceeds</u> referred

to in item 2 of this order." (ABGN Ex. 5, at 7, para. 14) (emphasis added).

Additionally, paragraph 14 requires Norma to affirmatively "release" any claims to the American Savings stock and proceeds. It is likewise undisputed that she never has done so. As part of the same settlement, Kachina agreed to pay Norma's attorney, Lester Penterman, the sum of $50,000 for attorneys' fees. (ABGN Ex. 5, at 4, para. 4). It is undisputed that this sum has never been paid by Kachina or by any of the other parties to the litigation.

Generally, contract law is well settled that where promised performances are due simultaneously, the material failure of one party to perform discharges the other party's duty to perform, and neither party has a claim against the other. RESTATEMENT (SECOND) OF CONTRACTS, §§ 234, 237, 238 cmt. a (1981). Therefore, since Kachina never honored its settlement with Norma, Norma's obligation to transfer any interest in the American Saving stock, or the proceeds from the $28,756.87 fund, evaporated.

As a result Norma's interest in the $28,756.87 fund, and in the stock of American Savings (to the extent any remains) has never

left her hands. She still owns both the stock and Kachina's former interest in the disputed fund.

4. ABGN Sales' Position

ABGN contends that it owns the $28, 756.87 fund, by virtue of assignments received in a chain from Kachina Plywood. The documents attached to its motion purport to show the chain of title ending with ABGN. The documents are:

a.	September 25, 1980	An order of the Maricopa County Superior Court simply reciting that a summary judgment was granted in favor of Milton G. Pace II. However, the Order does not describe the subject matter of either the lawsuit of the judgment. (ABGN Ex. 4). Nor does it describe an assignment. Indeed, if it did, how would ABGN explain the Nov. 14, 1981 assignment from Kachina to L & L?

b.	November 14, 1981	Assignment from Kachina Plywood, Inc. to L & L Sales Co. (ABGN Ex. 6).
c.	February 8, 1990	Assignment from L & L Sales Co. to CTA Corp. (ABGN Ex. 6).
d.	January 10, 1992	Assignment from CTA Corp. to ABGN (ABGN Ex. 6).

ABGN argues that it is a "holder in due course" of whatever interest Kachina once had in the $28,756.87 fund. However, in order to qualify for the status of a "holder in due course" under the Arizona Uniform Commercial Code, the holder must:

1) have paid value for the instrument;

1) have taken the instrument in good faith; and

2) be without notice of any defense or claim against the asset by any person.

Ariz. Rev. Stat. § 47-3302(A). When circumstances are such that suggest suspicion or irregularities, then a person or entity which attempts to claim holder in due course status has a duty to investigate. This case cried out for such investigation. ABGN's principal is Milton G. Pace II, the adult son of Norma Hurt and

Milton Pace. His divorced parents have been involved, for decades now, in constant litigation and numerous appeals. This asset has always been included in their litigation. This court would be hard-pressed, and blind to the realities of this case, if it were to find that the principal of the current claimed owner, the Pace's son had, by sheer coincidence, made a business decision to acquire an asset which had been the subject of divorce litigation between his parents some 21 years previous, and a subject of continuing controversy ever since.

Not only is there no evidence in this record that ABGN paid any consideration to acquire Kachina's interest in the American Savings' $28,756.87 fund there is also no evidence that diligent inquiry was made as to whether any interest therein was claimed by Norma. See In re Nash, 49 B.R. 254 (Bankr. D. Ariz. 1985), aff'd 60 B.R. 27 (9th Cir. BAP 1986); Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977). The ongoing history of Milton and Norma's dealings mandated investigation by the parties' son, who now claims ownership through his corporation, ABGN. There is no evidence that he conducted such an investigation. Had he done so (assuming

he did not already have such knowledge), he would have quickly discovered that Norma claimed the fund for her own. Therefore, ABGN's contention that it is a holder in due course is found to be without merit. None of the statutory elements for this status have been shown to have been proven.

Nor can ABGN use the Arbitration Award of January 13, 1995 against Norma (ABGN Ex. 1). Norma was not a party to that litigation. That action was commenced in 1993. Norma's bankruptcy case had been pending since 1985. The automatic stay of 11 U.S.C. § 362(a) would have barred any lawsuit against Norma in any forum other than the bankruptcy court, unless the bankruptcy court had modified the stay. Since Norma clearly had a claim to this asset since her May 15, 1978 divorce (Hurt Ex. 2), and the recognition of this interest as such asset in Adv. 87-199 (decided April 3, 1990; Hurt Ex. 12), the 1993 arbitration plaintiff, ABGN should have, at a minimum,

1) included Norma as a defendant and sought stay relief from the bankruptcy court in order to do so; or

2) brought the asset entitlement/ownership issue in the bankruptcy court as an adversary proceeding, in order to adjudicate the validity, priority or extent of an interest in property. F.R. Bank P. 7001(2).

By failing to take either or both of these steps, ABGN's eventual award against American Savings did not negatively affect any interest in the same fund claimed by Norma. Thus, there is no *res judicata* or collateral estoppel effect attributable to that award in the instant proceeding. *Cf., In re Daley,* 776 F.2d 834, 839 (9th Cir. 1985), *cert. denied sub nom, Daley v. Frank,* 476 U.S. 1159 (1986).

B. CONCLUSION

The $28,756.87 fund, and any interest accrued thereon, is declared to be the property of the debtor, Norma J. Hurt.

Such fund shall be paid to her, subject to first reimbursing American Savings for any filing fee paid by it in this proceeding.

Counsel for plaintiff shall present a form of Judgment within 15 days. Any appeal therefrom must be filed with 10 day after entry of the Judgment on the Clerk's docket. Bankr. R. 8002.

Dated this 3rd day of May, 1999.

JAMES M. MARLAR
U.S. BANKRUPTCY JUDGE

Copy of the foregoing mailed
this 3rd day of May, 1999 to:

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United States Trustee
P.O. Box 36170
Phoenix, AZ 85067-6170

By: _____ Deputy Clerk (jp)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:	)	Chapter 11
	)	
	)	No. 85-3802 PHX JMM
	)	
NORMA J. HURT, fka	)	
NORMA J. PACE	)	
Debtor.)		
	)	
NORMA J. HURT,	)	
Plaintiff/Petitioner,	)	ADV. 96-485
	)	
vs.	)	
	)	
AMERICAN SAVINGS LIFE	)	
INS. CO., KACHINA	)	**JUDGMENT**
PLYWOOD, INC., and ABGN	)	JUDGMENT RECORDED IN
SALES, INC.,	)	THE OFFICE OF THE CLERK
Defendants/Respondents)		U.S. BANKRUPTCY COURT
	)	99-105 DATE: 5-24-99

The above-entitled matter having come on regularly for hearing, and having been submitted to the Court.

No just cause exists to delay the entry of final judgment in this matter.

The Plaintiff, NORMA J. HURT, and the Defendants, AMERICAN SAVINGS LIFE INSURANCE COMPANY and

ABGN SALES, INC., have filed herein cross motions for summary judgment.

KACHINA PLYWOOD, INC. failed to file a responsive memorandum as required in the *Court's Order* entered on January 29, 1999, and has made no appearance in this action.

The Plaintiff and Defendants have agreed to the material facts, and the Court in its *Memorandum Decision*, entered on May 3, 1999, resolved the legal effect to be given to those facts.

The *Memorandum Decision* of May 3, 1999 is incorporated herein by reference.

The Court finds that Norma J. Hurt, is entitled to the $28,756.87, plus all accrued interest thereon, which is held on deposit in a Merrill Lynch Government Fund Account No. 3235198, Fund No. 278, Identification No. 86-0113763.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED,

A. That the principal and interest held in the Merrill Lynch Government Fund No. 3235198, Fund No. 278, is the property of the bankruptcy estate of Norma J. Hurt;

B. That Merrill Lynch is hereby authorized and directed to turn the proceeds held in this Fund over to Norma J. Hurt, the Debtor in Possession.

C. That Norma J. Hurt shall reimburse American Savings Life Insurance Co. for any filing fee paid by them to appear in this action;

D. That the parties shall bear their own costs and attorneys' fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Norma J. Hurt shall apply the funds received to the joint and general obligation of Kachina Plywood, Inc. under the terms of the *Order and Judgment* entered on April 3, 1990, in Adversary 87-199; said funds to be then applied to interest which has accrued on said Judgment.

DATED this 17th day of May, 1999.

The Hon. James M. Marlar
United States Bankruptcy Judge

ORIGINAL AND ONE COPY of the

foregoing LODGED this 10th day of May, 1999,
and COPY mailed to:

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NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:	)BAP Nos. AZ-99-1392-KPRy
	) AZ-99-1450-KPRy
	)Bankr. No. 85-3802 PHX JMM
	)
NORMA J. HURT, fka	)
NORMA J. PACE	)
Debtor.)	
_____	)
MILTON G. PACE, II,	)
Appellant,	) ADV. 96-485
	)
vs.	)
	)
NORMA J. HURT; ABGN	)
SALES; AMERICAN SAVINGS	) MEMORANDUM[3]
LIFE INSURANCE, CO.;	)
UNITED STATES TRUSTEE,	)
Appellees.	)
_____	)
ABGN SALES, INC.,	)
Appellant,	)
	)
i.	)
	)
NORMA J. HURT and	)
AMERICAN SAVINGS LIFE	)
INSURANCE CO.,	)
Appellees.	)

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[3] This disposition is not appropriate for publication and may be not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 6013-1 and 9th Cir. Rule 36.3

Argued and Submitted on March 23, 2000
at Phoenix, Arizona

Filed - May 15, 2000

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Bankruptcy Judge, Presiding.

Before: KLEIN, PERRIS, and RYAN, Bankruptcy Judges.

These two appeals involved a dispute over ownership of a fund that amounts to about $28,000. The competing claimants are the debtor and a corporation owned by the debtor's son. The debtor filed an adversary proceeding against the corporation to determine ownership of the funds. After the corporation lost, the debtor's son attempted unsuccessfully to intervene. These appeals ensued and constitute yet another installment in the decades-old Milton Pace-Norma Hurt litigation feud.

In our No. AZ-99-1450, ABGN Sales, Inc. appeals the bankruptcy court's order granting summary judgment in favor of the debtor, Norma J. Hurt, as well as the court's refusal to abstain in favor of the state court.

In our No. AZ-99-1392, Milton G. Pace, II appeals the bankruptcy court's denial of his motion to intervene in an effort to have the court reconsider its order granting summary judgment in favor of his mother.

FACTS

The operative facts date back to the May 1978 divorce of appellee Norma J. Hurt ("Hurt") and Milton Pace, Sr. ("Pace Sr."). They have ever since been clutched in a litigation embrace that shows every prospect of lasting until death do they part.[4]

The present appeals concern the claims of their son Milton Pace, II ("Pace II") and ABGN Sales, Inc. ("ABGN') a corporation controlled by Pace II, to property (a $28,000 fund) that Hurt claims

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[4] They have, for example, been parties to several BAP appeals. ITNX v. Hurt (In re Hurt), BAP No. AZ-98-1532-KPRy, slip op. (September 10, 1999; Pace v. Hurt (In re Hurt), BAP No. AZ-99-1006-KAS, slip op. (November 1, 1999); and Camden Props. Corp. v. Hurt (In re Hurt), BAP Nos. AZ 99-1092 & 1437-KPRy, slip op. (February 18, 2000).

to own. The facts and procedural history of the case are labyrinthine.[5]

In the Pace Sr. - Hurt divorce property settlement, Hurt was awarded all of the stock owned by the marital community in several corporations, including Kachina Plywood, Inc. ("Kachina"), which in turn owned shares of American Savings Life Insurance ("American Savings"). Pace Sr. transferred all of his shares to Hurt in 1978 pursuant to the settlement, at which time he certified that no other shares in the corporations were outstanding.

Subsequently, Hurt discovered that Pace II claimed to own valid stock in Kachina. In 1979, Hurt brought a complaint in Arizona state court, seeking a determination that any shares other than the ones owned by her were invalid. Pace II claimed to have purchased $10,000 worth of stock in Kachina in 1975 for valid consideration and moved for summary judgment. The state court in 1980 granted Pace II's motion for summary judgment. (Judgment in

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[5] The bankruptcy court in fact resorted to charting the events in its memorandum decision. (Memorandum Decision in Adversary No. 96-485, ER tab 15).

Arizona No. C 372142, ER tab I) Hurt and the defendants, including Pace II, then stipulated to dismissal of the matter with prejudice in 1981. (Stipulation to Dismissal with Prejudice, ER tab J.) Although the consequence was that Pace II[6] merely is another shareholder, he interprets the state court order and the stipulation as giving him sole ownership of all Kachina stock.

One of Kachina's assets was 20,000 shares of American Savings, which had been placed in receivership in 1977 for fraudulent investment practices. The state court plan of reorganization provided that some of the defrauded investors, which included Kachina, had the option to seek rescission of stock and receive payment.

In 1981, Kachina allegedly transferred its interest in the American Savings shares to L & L Sales Corporation.

Despite the purported transfer to L & L Sales in 1980, Kachina continued to exercise control over the shares. In 1987, Kachina elected to exercise the reorganization option, and have the

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[6] Pace II is CEO of Kachina, which was a petitioning creditor in the involuntary bankruptcy petition against Hurt.

shares rescinded for payment of $27,962.48. American Savings accordingly canceled the stock and put the funds ("Proceeds") into an account until ownership of the Proceeds could be established.

Appellant ABGN claims to be the present transferee of L & L Sales' rights.

Meanwhile, in the Hurt bankruptcy (which was filed in 1984 as an involuntary case by entities associated with Pace Sr.), Hurt had filed an adversary proceeding in 1987 to clear title to numerous properties and resolve claims of various creditors. Pace Sr. had transferred interests in properties to corporations he owned or controlled as a way to frustrate implementation of the divorce property settlement. Many of these corporations were also creditors in Hurt's bankruptcy.

Hurt, Pace Sr., and the other creditors, which included Kachina, entered into a settlement in 1990 that was approved by the bankruptcy court and that resulted in an order quieting title and

dismissing claims (the "1990 judgment").[7] The 1990 judgment provided that the Proceeds from the American Savings stock were property of Hurt (paragraph 2). In addition, the judgment provided that Hurt would release her claims in the American Savings stock, which was distinct from the Proceeds described in paragraph 2, when Kachina and the other creditors met certain conditions, including payment of $50,000 for Hurt's legal fees. As part of the 1990 judgment, Kachina had certified that no assignments of stock had or would be made.

Then in 1993, the old 1981 "assignment" from Kachina to L & L sales surfaced. ABGN commenced an action in Arizona state court claiming ownership of the Proceeds held by American Savings, claiming to be a "holder in due course" of the interest Kachina held before 1981. Purportedly, Kachina had assigned its interests to L & L Sales in 1981, who then assigned to CTA Corp. in 1990, who

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[7] The 1990 judgment was appealed by Pace Sr. Both the BAP and the Ninth Circuit affirmed. Certiorari was denied by the U.S. Supreme Court. Pace v. Hurt (In re Hurt), 26 F.3d 130, 1994 WL 224263 (9th Cir. 1994), cert. denied, 514 U.S. 1094 (1995).

assigned the interests to ABGN in 1992. Pace II is coincidentally the CEO of both Kachina and ABGN.

An arbitrator awarded the Proceeds to ABGN in 1995 in a proceeding to which Hurt was not a party. American Savings appealed the award in Arizona state court and lost. Before issuing the final order regarding the ownership of the Proceeds; the Arizona court required that notice be given to Hurt. In 1996, upon receiving this notice and learning of the proceeding, Hurt filed an adversary proceeding to assert her claim to the Proceeds.

The bankruptcy court initially granted ABGN's motion to abstain and dismissed the adversary proceeding by order dated August 1, 1996. Then it reversed itself on Hurt's motion for reconsideration and, by order dated September 16, 1996, vacated the dismissal of the adversary proceeding.

Hurt filed a motion for summary judgment, alleging that there were no material facts in dispute as to ownership of the Proceeds. ABGN filed a response and a cross motion for summary judgment.

The bankruptcy court entered judgment in favor of Hurt on May 9, 1999. It held that Hurt owned the Proceeds held in trust and the interest accrued thereon. ABGN moved for reconsideration, arguing that the bankruptcy court has been misled by Hurt's attorney regarding the ownership of the Kachina stock and that the Arizona court's grant of summary judgment to Pace II in 1980 had determined that he was the rightful owner of the stock and further that Hurt's claims were barred by res judicata. The bankruptcy court denied the motion. ABGN's appeal ensued.

Pace II, acting in pro per, and after judgment had been entered in the adversary proceeding, filed a motion that he styled as a motion for joinder and for reconsideration of the judgment. The bankruptcy court, correctly construing the motion as a motion to intervene and reconsider, denied both parts of the motion. Pace II's appeal ensued.

ISSUES

Whether the bankruptcy court erred in granting Hurt's motion for summary judgment.

Whether the bankruptcy court abused its discretion in denying Pace II's motion to intervene.

Whether the bankruptcy court erred in refusing in abstain pursuant to 28 U.S.C. § 1334 (c)(1) & (2).

STANDARDS OF REVIEW

Orders granting summary judgment are reviewed de novo. Yarbrow v. FDIC (In re Yarbrow), 150 B. R. 233, 236 (9th Cir. BAP 1993). Summary judgment should be granted when there is no issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

A bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. Alexander v. Bleau (In re Negrate), 183 B. R. 195, 197 (9th Cir. BAP 1995), citing S.G. Wilson Co. v. Cleanmaster Indus., Inc. (In re Cleanmaster Indus., Inc.), 106 B.R. 628, 630 (9th Cir. BAP 1989), *aff'd* 103 F. 3d 139 (9th Cir. 1996).

Denial of a motion to intervene is reviewed de novo. Smith v. Marsh, 194 F.3d 1045, 1049 (9th Cir. 1999). A determination of the timeliness of a motion to intervene is reviewed for abuse of discretion. Id.

DISCUSSION

I

The central issue revolves around the grant of summary judgment in favor of Hurt, granting her the Proceeds and the accrued interest, and concomitant denial of ABGN's cross motion for summary judgment.

ABGN claims entitlement to the Proceeds through a chain of title begun with the 1981 assignment to L & L Sales. Hurt, in contrast, claims entitlement to the Proceeds through the 1990 judgment.

A

The bankruptcy court, looking at Kachina's subsequent exercise of control over the Proceeds as well as (apparently) its complicity in the shenanigans of the Paces through the years, disregarded the 1981 transfer as a sham, holding that it was "never really assigned." The balance of the court's reasoning follows from that conclusion. If the rights to the Proceeds remained with Kachina after 1981, then the 1990 judgment is significant.

While the question of the validity of the 1981 assignment from Kachina to L & L Sales is inherently a disputable factual matter that strikes us as a poor candidate for summary judgment, neither of the appellants contend in this appeal that the bankruptcy court granted summary judgment in the teeth of a genuine issue of material fact. We articulated the potential issue during oral argument of this appeal and offered the parties the opportunity to assert that there was a genuine issue of material fact. They did not avail themselves of the opportunity. Hence, the issue is waived.

B

ABGN claims the $28,000 fund as a holder in due course of Kachina's interest in the Proceeds. ABGN allegedly acquired its interest in 1992, through an assignment by CTA. CTA allegedly received its interest from L & L Sales in 1990. L & L Sales allegedly received its interest from Kachina in 1981.

To be a holder in due course of an interest in property, a party must meet several requirements, including proving that it took the interest for value, in good faith, and without notice of any claim to the instrument. Ariz. Rev. Stat. § 47-3302.

There is no evidence in the record that ABGN actually paid any consideration for the assignment. A mere recital that the assignment was "for value received" is insufficient, especially in the absence of an affidavit stating that consideration was paid.

Pace II is the president and sole officer of ABGN. He is Hurt's son, and presumably is familiar with, and has participated in, the battles over property that have raged between his parents. Pace II was also the president of Kachina at the time of the 1990 judgment. Thus, Pace II must have had knowledge, at the time of the assignment from CTA in 1992, that Hurt claimed an interest in the

Proceeds based on the 1990 Settlement. That knowledge is imputed to ABGN because Pace II signed the assignment as ABGN's president.

The bankruptcy court's finding that ABGN is not a holder in due course of an interest in the Proceeds is not erroneous.

The bankruptcy court did not err in denying ABGN's cross motion for summary judgment.

C

ABGN argues that the bankruptcy court erred in granting summary judgment to Hurt because Hurt does not own Kachina stock. This argument is based upon the alleged preclusive effect of the 1981 dismissal of Hurt's state court case.

In 1979, Hurt filed suit against Pace II and others in state court, seeking cancellation of any Kachina stock issued to anyone other than herself or Pace Sr. That suit was dismissed with prejudice in 1981. As a result of the dismissal, no stock was canceled. The dismissal did not change the ownership of the stock granted to Hurt in the divorce judgment. It did not prove, as ABGN asserts, that Hurt

has no claim to Kachina stock, nor did it prove that anyone else does not own Kachina stock.

Even if Pace II does own some Kachina stock, Hurt is still entitled to the Proceeds pursuant to the 1990 judgment to which both Hurt and Kachina were parties. That order was affirmed by the BAP and Ninth Circuit, and became final and unappealable in 1995 when the Supreme Court denied certiorari.

Kachina agreed to a settlement that provided that Hurt owned the Proceeds, subject to her agreement to release the Proceeds to Kachina when Kachina and the other defendants complied with other provisions of the settlement. Ownership of the Kachina stock is irrelevant, because the Proceeds were granted to Hurt.

It is undisputed that Kachina has not complied with the 1990 judgment. Kachina has joint and several liability to Hurt for over $50,000, plus interest, which has not been paid.

Where a contract requires concurrent performances by the parties, the material failure of performance by one party relieves the

other parties from their performance obligations. Restatement 2d (Contracts) § 238, cmt. a.[8]

Kachina's failure to pay the sums due to Hurt relieves Hurt of her promise to release the Proceeds to Kachina. Thus, Hurt retains all her rights to the Proceeds.

II

Pace II appeals the bankruptcy court's denial of his motion to intervene and for reconsideration of the order granting summary judgment to Hurt.

A

Pace II filed a motion for joinder, citing Federal Rule of Civil Procedure 19. Although he called it a motion for joinder, he was actually attempting to interject himself into the adversary

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[8] Arizona law follows the Restatement (Second) of Contracts. Foundation Day Corp. v. Loehmann's Inc., 163 Ariz. 438, 446, 788 F.2d 1189, 1197 (Ariz. 1990) (relying on Restatement).

proceeding, which is an application for intervention pursuant to Rule 24.

The bankruptcy court correctly construed Pace II's motion as one for intervention.

A non-party seeking to intervene must demonstrate that: 1) the application is timely; 2) the applicant has a "significantly protectable" interest relating to the proceeding, 3) disposition of the proceeding may, as a practical matter, impair or impede the applicant's ability to protect his interest, and 4) the interest is not adequately protected by the parties. Marsh, 194 F.3d at 1049. The non-party does not have the right to intervene in the absence of any of the four factors. Id.

Timeliness of an application to intervene is determined by analysis of : "1) the stage of the proceeding at which an applicant seeks to intervene; 2) the prejudice to other parties; and 3) the reason for and length of the delay." Id. at 1050.

The "stage of the proceeding" factor is concerned with whether the court has substantially engaged with the issues in the case. Id. at 1051. In this case, Pace II sought to intervene at the very

end of the proceeding. The bankruptcy court had already rendered its decision granting summary judgment in the action. The bankruptcy court had substantially engaged with, and decided, the issues in this proceeding.

Hurt and ABGN would be prejudiced by allowing Pace II to intervene. The parties have already litigated the issues through cross motions for summary judgment. Interjecting Pace II at this point would force the parties to redo the entire proceeding.

The crucial date for determining the delay of an application to intervene is when the applicant should have known that his interests were not adequately protected. Here, Pace II is the president and only shareholder of ABGN, the named defendant. He caused ABGN to file the 1993 suit in state court seeking to obtain the funds at issue. He argued in both the state court and the bankruptcy court that ABGN was entitled to the funds. Pace II should have known from the beginning, in 1993, that any personal interest he had in the funds could be at risk.

Pace II's only explanation for his delay in seeking to intervene is that he did not know his interests were at risk until his

corporation, ABGN, lost on summary judgment and funds were awarded to Hurt. This explanation is not a persuasive excuse for his delay.

Pace II waited until ABGN lost on summary judgment before seeking to intervene, then did not adequately explain his delay. Allowing Pace II to intervene at this late juncture would prejudice the parties already before the court. The bankruptcy court did not abuse its discretion in holding that Pace II's motion was not timely.

It was proper to deny Pace II's motion to intervene because the motion was not timely. Marsh, 194 F.3d at 1049.

B

Pace II is not a party to this adversary proceeding because his motion for intervention was denied. Thus, he has no standing to move for reconsideration of the order granting summary judgment to Hurt. The bankruptcy court did not abuse its discretion in denying Pace II's motion for reconsideration.

III

ABGN argues that the bankruptcy court erred in reconsidering and reversing the court's earlier order of abstention. The appellant contends that the bankruptcy court should have abstained pursuant to 28 U.S.C. § 1334 (c)(1) or (2).

A

Section 1334 (c)(1) allows bankruptcy courts the discretion to abstain from hearing a matter in the interests of justice, comity with state courts, or respect for state law.

The appellant has the burden of proving that the court abused its discretion by failing to abstain under this section. See e.g., Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 68-69 (9th Cir. BAP 1990). ABGN has not carried its burden. ABGN's sole argument on this issue is its statement that "virtually every factor in this case favored abstention." The record on appeal does not indicate that the bankruptcy court abused its discretion.

B

Abstention is mandatory under § 1334(c)(2) if seven elements are satisfied: 1) a timely motion; 2) a purely state law question; 3) related to a case under Title 11; 4) a lack of independent federal jurisdiction absent the petition under Title 11; 5) that an action is commenced in state court; 6) the state court action may be timely adjudicated; and 7) a state forum of appropriate jurisdiction exists. World Solar Corp. v. Steinbaum (In re World Solar Corp.), 81 B.R. 603, 606 (Bankr. S.D. Cal. 1998).

The dominant issue in this appeal is the timely adjudication requirement. The party seeking abstention, ABGN, has the burden of proving that the matter could be timely adjudicated in state court. Personette v. Kennedy (In re Midgard Corp.) 204 B.R. 764, 778 (10th Cir. BAP 1997).

The timely adjudication requirement focuses on whether abstention would adversely impact the efficient and expeditious administration of the bankruptcy estate. Id. ABGN offered no proof on this issue.

Regardless of whether timely adjudication in state court would have been possible in 1996, such timely adjudication would

now, in the year 2000, be impossible. The bankruptcy court's order vacating the abstention was dated September 16, 1996. More than four years have passed, and the matter has been resolved by the bankruptcy court. Hurt's bankruptcy case has already continued for more than 16 years because of persistent litigation and appeals by entities owned and controlled by Pace Sr. and Pace II. Further delays caused by abstention in this matter would impede efficient and expeditious administration of Hurt's bankruptcy estate.

Assuming that the order refusing to abstain is an interlocutory order that is not immediately appealable as of right, it nevertheless may be appealed with permission. 28 U.S.C. § 158(a)(3). ABGN did not promptly seek leave to appeal the order. Rather, it waited for a number of years to raise the question and raised it only after the matter had been resolved in Hurt's favor. Given the timely adjudication requirement, it was incumbent upon ABGN to seek leave to appeal the order refusing to abstain.

The matter is now too stale for there to be a timely adjudication in state court.

CONCLUSION

The bankruptcy court did not err in granting summary judgment regarding the Proceeds in favor of Hurt. The only arguable basis for finding error - the existence of a genuine issue of material fact - has been waived by appellants.

Pace II's application to intervene was not timely, and was properly denied. As a non-party, Pace II has no standing to move for reconsideration of the court's order granting summary judgment.

Finally, the bankruptcy court had the authority to change its mind about abstention and vacate the order dismissing the adversary proceeding.

As we noted at the outset, the parties have now consumed legal resources that dwarf the $28,000 fund in controversy. No end is in sight. We can only lament that we lack the power to lay the feud to rest.

As we are limited to the issue properly before us, we AFFIRM.

RYAN, Bankruptcy Judge, concurring:

Although I agree with the majority that the court did not err in (1) granting summary judgment in favor of Hurt, (2) denying Pace II's motion to intervene, or (3) vacating the order abstaining from the adversary proceeding, I write separately because I do not believe that we need to reach the issue of whether ABGN was a holder in due course, whether the assignments were valid, or whether Kachina's failure to comply with the 1990 Judgment relieved Hurt of her promise to release the Proceeds to Kachina.

In its opening brief, ABGN contends that by concluding that Hurt was the true owner of Kachina stock, the bankruptcy court's ruling violated the principle of collateral estoppel because it did not give effect to the 1980 state court order granting Pace II's motion for summary judgment. Specifically, ABGN argues that "this litigation is collateral estoppel with regard to Ms. Hurt's claims to Kachina's stock and there was no good faith basis for her to have asserted to Bankruptcy Court that she was the true owner of Kachina's stock." Appellant's Opening Br., at 9. ABGN then argues that "[o]nce the infirm foundation of the Bankruptcy Court's opinion is removed, i.e. that Norma Hurt is a true owner of Kachina stock, there is no longer

any reason for ABGN to [be] denied entitlement to these proceeds." Id. at 13. Therefore, it contends that the court erred in granting Hurt's summary judgment motion.

As noted by the majority, the actual consequence of the 1980 state court proceeding was that Pace II was simply another shareholder, not that he owned all shares of Kachina stock. Thus, ABGN's argument is without support and the court therefore did not err in granting Hurt's summary judgment motion. Because this is the only argument raised on appeal with respect to the summary judgment motions, it is unnecessary to discuss whether ABGN was a holder in due course, whether the assignments were valid, or whether Kachina's failure to perform under the 1990 judgment excused Hurt's promise to release the Proceeds to Kachina.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:	) No. 00-16329	
	)	
	)BAP No. AZ-99-01392-KPRy	
NORMA J. HURT,	)	
	) FILED	
Debtor.)	Jun 04 2001	
	) Cathy A. Catterson, Clerk	
MILTON G. PACE, II,	) U.S. Court of Appeals	
Appellant,	)	
	)	
vs.	)	
NORMA J. HURT; ABGN	)	
SALES; AMERICAN SAVINGS	) ORDER[1]	
LIFE INSURANCE,	)	
UNITED STATES TRUSTEE,	)	
Appellees.	)	
	)	
In re: NORMA J. HURT	)	
	)	
ABGN SALES, INC.,	) No. 00-16332	
Appellant,	) BAP No. AZ-99-01450-KPRy	
v.	)	
AMERICAN SAVINGS LIFE	)	
INSURANCE;	)	
NORMA J. HURT,		
Appellees.	)	

1 This disposition is not appropriate for publication and may be not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel

Klein, Perris and Ryan, Judges Presiding

No. 00-16329 Submitted May 15, 2001[2]
No. 00-16332 Argued and Submitted May 15, 2001

Before: HUG and T.G. Nelson, Circuit Judges and SHADUR,[3] District Judge.

We affirm both appeals for the reasons stated by the Bankruptcy Appellate Panel in its well-reasoned May 15, 2000 Memorandum.

AFFIRMED.

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[2] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

[3] Honorable Milt I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NORMA J. HURT
Debtor.

No. 00-16332

ABGN SALES,
Appellant,

BAP No AZ-99-01450-KPRy

v.

AMERICAN SAVINGS LIFE INSURANCE; NORMA J. HURT,
Appellees.

ORDER
FILED
SEP -4-2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: HUG and T.G. NELSON, Circuit Judges, and SHADUR, District Judge.[1]

The panel has voted to deny the petition for rehearing. Judges Hug and Nelson have voted to deny the suggestion for rehearing en banc and Judge Shadur so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

[1] Honorable Milton I. Shadur, Senior United States District Judge for the Norther District of Illinois, sitting by designation.

The petition for rehearing and suggestion for rehearing en banc are denied.